United States Bankruptcy Court
Central District of California
Los Angeles
Robert Kwan, Presiding
Courtroom 1675 Calendar

Wednesday, August 16, 2023 **Hearing Room 1675**

1:00 PM
2:00-00000 **Chapter**

#0.00 During the COVID-19 pandemic, and until further notice by the Court, or as otherwise ordered by the Court, appearances for matters heard by Judge Kwan in Courtroom 1675 may be made in-person, by video through Zoom for Government (ZoomGov), or by telephone through ZoomGov. If appearing through ZoomGov, hearing participants and other parties in interest may connect to the video and audio feeds, free of charge, using the connection information provided below.

As a hearing participant, you are free to choose any of these options, except that evidentiary hearings/trials must be in person in the courtroom (unless otherwise ordered). You do not need to call Chambers for advance approval or notice.

If you choose to appear in person, you must comply with all applicable Centers for Disease Control and Prevention (CDC) guidelines regarding the wearing of face coverings and physical distancing inside and outside of the courtroom. Pursuant to the Court's General Order 21-05, where an in-person matter is held in a courtroom, all participants are to observe all safety protocols posted and announced in the courtroom, and Judge Kwan as the presiding judge will determine the protocols in effect in his assigned courtroom consistent with guidance from the CDC. By order of Judge Kwan, all persons that choose to appear in person must wear a face covering or mask covering their nose and mouth, and must observe physical distancing inside and outside of the courtroom. However, with permission of Judge Kwan, a witness testifying on the witness stand may remove his or her face covering while testifying in order for the court and the parties to observe the witness's demeanor. You should not enter the courthouse when feeling unwell, if you have tested positive for COVID-19, or if you fall within the quarantine recommendations after having come into close contract with someone who has COVID 19.

ZoomGov logon information for all matters on today's hearing calendar:

Video/audio web address: https://cacb.zoomgov.com/j/1602474432

ZoomGov meeting number: 160 247 4432

United States Bankruptcy Court
Central District of California
Los Angeles
Robert Kwan, Presiding
Courtroom 1675 Calendar

Wednesday, August 16, 2023 **Hearing Room 1675**

1:00 PM
CONT... **Chapter**

Password: **319821**

Telephone conference lines: **1 (669) 254 5252 or 1 (646) 828 7666**

Please connect at least 5 minutes before the start of your hearing, and wait with your microphone muted until your matter is called.

Zoomgov hearing etiquette: (a) wait until the judge calls on you, so everyone is not talking at once; (b) when you first speak, state your name and, if you are an attorney, whom you represent (do not make your argument until asked to do so); (c) when you make your argument, please pause from time to time so that, for example, the judge can ask a question or anyone else can make an objection; (d) if the judge does not see that you want to speak, or forgets to call on you, please say so when other parties have finished speaking (do not send a "chat" message, which the judge might not see); and (e) please let the judge know if he mispronounces your name or uses the wrong pronoun.

Docket 0

Tentative Ruling:

- NONE LISTED -

United States Bankruptcy Court
Central District of California
Los Angeles
Robert Kwan, Presiding
Courtroom 1675 Calendar

Wednesday, August 16, 2023 **Hearing Room 1675**

1:30 PM

2:13-14135 Art and Architecture Books of the 21st Century **Chapter 11**

Adv#: 2:15-01679 THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF T v.

#0.00 Pre Trial conference re: Complaint for: (1) Avoidance, recovery, and preservation of fraudulent transfers; (2) Avoidance, recovery, and preservation of preferential transfers; (3) Turnover of property; (4) Avoidance and recovery of transfers; (5) Avoidance and recovery of post-petition transfers to defendant ACE Gallery New York Corporation; and (6) Disallowance of claims
fr. 5/25/22, 10/26/22, 1/18/23, 3/15/23

Docket 1

Tentative Ruling:

Updated tentative ruling as of 10/13/22. Pursuant to the amended scheduling order entered on 10/3/22, the pretrial conference is continued to 1/18/23 at 1:30 p.m. No appearances are required on 10/26/22.

Prior tentative ruling as of 5/23/22.

Regarding the Plan Agent's claims against 400 S. La Brea Parties, Cathay Bank, Douglas Chrismas and his controlled entities in the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th claims for relief for avoidance, recovery and preservation of prepetition transfers are legal (as opposed to equitable) claims subject to the holding of *Stern v. Marshall,* 564 U.S. 462, 499 (2011) ("the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process," if the answer is no, the non-Article III bankruptcy court lacks jurisdiction to enter a final judgment) for which there is a jury trial right, which has been invoked, should be tried by jury in the Article III district court. These claims do not stem from the bankruptcy itself and would not necessarily be resolved in the claims allowance process, and are thus subject to the holding of *Stern v. Marshall* that the bankruptcy court may not enter a final judgment on such claims. The bankruptcy court may not conduct a jury trial of these claims absent the express consent of the parties, which is not given here. 28 U.S.C. 157(e). Similarly, the Plan Agent's 11th claim for relief for conversion under California common law against these defendants is also a *Stern* claim that does not stem from the bankruptcy itself and would not necessarily be resolved in the

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

claim allowance process. This claim is also a legal claim for which there is a jury trial right, which has been invoked with no express consent of the parties to the bankruptcy court conducting the jury trial, and thus, this claim should be tried by jury in the district court. The parties' briefing is in accord with this tentative ruling on how and where these claims should be tried.

The Plan Agent's claims against these defendants in the 1st, 8th, 9th and 10th claims for relief for avoidance, recovery and preservation of postpetition transfers and turnover are not *Stern* claims as they stem from the bankruptcy itself, are equitable in nature and could be tried by either the bankruptcy court or the district court without a jury. *See, e.g., M & L Business Machine Co. v. Youth Benefits Unlimited, Inc. (In re M & L Business Machine Co.)*, 59 F.3d 1078 (10th Cir. 1995); *In re Belmonte*, 551 B.R. 723 (Bankr. E.D.N.Y. 2016); *Murphy v. Felice (In re Felice),* 480 B.R. 401 (Bankr. D. Mass. 2012); *Salven v. Lyons,* No. CIV-F-06-1114-AWI, 2007 WL 470625 (E.D. Cal. Feb. 9, 2007); *contra, In re Roberts,* 126 B.R. 678 (Bankr. W.D. Pa. 1991) ; *see,* Carlson, "Fraudulent Transfers and Juries: Was *Granfinanciera* Rightly Decided?," 95 Am. Bankr. L.J. 209 (Spring 2021) (article provides historical and analytical background on issue whether fraududent transfers are torts at law, which explain why courts have had difficulties in determining jury trial rights for such claims). However, Cathay Bank suggests that the law is "mixed" on whether a non-claimant has a right to a jury trial on claims to avoid postpetition transfers under 11 U.S.C. 549, *citing Salven v. Lyons.* The court in *Salven v. Lyons* held that there is no jury trial right for a claim under 11 U.S.C. 549, noting the one case in *In re Roberts* which held there was a jury trial right, but like other cases noting *Roberts* held there was no such right because a claim under 11 U.S.C. 549, "a provision clearly designed to protect the bankruptcy estate following its inception" by avoiding transfers of estate assets. *In re M & L Business Machine Co*., 59 F.3d at 1082. There is no controlling Ninth Circuit authority on this point. The court adheres to the majority view that there is no jury trial right for 11 U.S.C. 549 claims based on the equitable nature of the claims. *See, e.g., In re Felice*, 480 B.R. at 410-430. The issue of whether the majority position or the minority position in *Roberts* is correct is probably a moot issue in this case, because for the reasons discussed below, the court agrees with defendants that these equitable claims should be tried with the legal claims in the district court.

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

Regarding sequencing trial of legal and equitable claims in the adversary proceeding, the 400 S. La Brea Parties and Cathay Bank assert that the legal claims triable by jury in the district court must be tried before the equitable claims triable by the bankruptcy court on grounds that a prior nonjury trial of equitable claims may infringe upon a jury trial right based on the preclusive effect of a prior judicial determination of issues common to both sets of claims. *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.*, 890 F.2d 165, 170 (9th Cir. 1989). The Plan Agent asserts that his postpetition transfer avoidance claims may be tried in the bankruptcy court without regard to sequencing of the trial of the jury triable claims in the district because: (1) the postpetition transfer avoidance claims are equitable in nature and core proceedings, and thus, no jury trial right; (2) the Plan Agent is ready for trial of the postpetition transfer avoidance claims; (3) the 400 S. La Brea Parties waived their right to a jury trial of the postpetition transfer avoidance claims by asserting a counterclaim against the Plan Agent; and (4) trial of the postpetition claims in the district court would result in substantial additional delay and administrative expense. Regarding this dispute, the court is of the view that the defendants have the better argument as there are common questions of fact between the prepetition and postpetition transfer claims as asserted by the defendants since all of these claims involve overlapping facts relating to the subject lease and rent payments, equitable tolling, prepetition artist contracts and postpetition sales and the effect of the settlement agreement (the so-called "Shemano Settlement") as described by the 400 S. La Brea Parties and Cathay Bank in their briefing. Thus, the concerns raised in the *Dollar Systems* case are raised here, and the court agrees with defendants that the equitable claims should not be tried in the bankruptcy court before the jury triable claims in the district court. Moreover, the court agrees with defendants that given the overlapping evidence involved in trying all of these claims, it would be more expeditious to refer all of these claims for transfer avoidance, prepetition and postpetition, to the district court so that these claims are tried in one trial instead of two, resulting in less expense and delay in adjudicating these claims. *See, e.g., In re Hassan,* 376 B.R. 1, 21-22 (Bankr. D. Kan. 2007); *In re Roberts,* 126 B.R. at 683.

The Plan Agent's waiver argument is contrary to the holding in *Stern v. Marshall* that the non-Article III bankruptcy court lacked jurisdiction to enter a final judgment on a bankruptcy debtor's state law counterclaim a creditor who

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

filed a proof of claim in her bankruptcy case as the debtor's tortious interference claim did not relate to the creditor's defamation claim, that is, in answer to the question "whether the action at issue [i.e., debtor's tortious interference claim] stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process," the answer was no as to her counterclaim, which was also not related to the creditor's claim. *Stern v. Marshall,* 462 U.S. at 499. 400 S. La Brea's unjust enrichment claim is based on allegations that its tenant, Ace Museum, was in default on its rent payments at least several months before 5/13/16 as set forth in its 15-day notice to pay rent or quit, and among other things, the Debtor and its bankruptcy estate benefitted from non-payment of rent as Douglas Chrismas and his controlled entities caused Debtor's artwork assets to be stored on Ace Museum's premises during those few months and afterwards. ECF 253 filed on 11/20/17, paragraphs 83, 95-98 and 132-135. It does not appear that the unjust enrichment claim stems from the bankruptcy, would have been necessarily resolved in the claims allowance process or relates to the Plan Agent's claims in his amended complaints against 400 S. La Brea because the counterclaim for unjust enrichment does not stem from the bankruptcy, does not involve the claims allowance process as it is not a claim against the bankruptcy estate which no longer exists post-confirmation, *see In re Celebrity Home Entertainment, Inc.,* 210 F.3d 995, 998 (9th Cir. 2000), and the counterclaim is not related to the Plan Agent's claims to avoid the diversion of the Debtor's assets to alleged transferees.

Regarding the Plan Agent's claims against Defendant Jennifer Kellen, the court has reviewed the brief of her counsel regarding procedure for trial, and it notes that Plaintiff Sam Leslie, Plan Agent, did not address his claims against her. Counsel for Kellen notes that the Sixth Amended Complaint against her only asserts two claims against her, the 17th claim for relief for breach of fiduciary duty and the 19th claim for relief for aiding and abetting breach of fiduciary duty. Counsel for Kellen asserts that these claims have no relationship to the claims against the remaining defendants in this adversary proceeding and should be tried separately in the Bankruptcy Court after the claims against the other defendants are resolved on grounds that it would be economically prejudicial for Kellen and judicially impracticable to have all of these matters heard together. Counsel for Kellen further notes that her motion for allowance of an administrative expense claim under 11 U.S.C. §

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

503(b)(1)(A)(i) is still pending and should be heard with the claims in this adversary proceeding against her.

The claims against Kellen in the operative complaint in this adversary proceeding, the 6th amended complaint, ECF 699 in this adversary proceeding, for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, do not stem from the bankruptcy itself and would not necessarily be resolved in the claim allowance process, are thus legal claims subject to the holding of *Stern v. Marshall,* and the bankruptcy court cannot enter final judgment on these claims without Kellen's consent. Since neither party invoked a jury trial right for these claims asserted against Kellen pursuant to Federal Rule of Bankruptcy Procedure 9015, which make Federal Rules of Civil Procedure 38 and 39 applicable, these claims should be tried by the bankruptcy court which would submit a report and recommendation with proposed findings of fact and conclusions of law to the district court for *de novo* review in the absence of consent to the bankruptcy court entering a final judgment on these claims. 28 U.S.C. 157(c)(1); Federal Rule of Bankruptcy Procedure 9033; *see also, In re Mann,* 907 F.2d 923, 925-926 (9th Cir. 1990).

Apparently, Kellen in her brief is requesting a separate trial of the Plan Agent's claims in this adversary proceeding before the bankruptcy court, which is governed by Federal Rule of Bankruptcy Procedure 7042 which makes Federal Rule of Civil Procedure 42 applicable. A separate trial may be ordered on motion of a party or on the court's own motion, but the court will need to hear from the Plan Agent on her request. It may well be more economical and less prejudicial for Kellen to have a separate trial of the claims against her since she is the only defendant now in those claims as she was the sole defendant on one claim and she is now the remaining defendant on the other claim as the court granted summary judgment against her co-defendant Douglas Chrismas.

The court further notes that neither Kellen nor the Plan Agent addressed the pending claims in the separate adversary proceeding that the Plan Agent brought against Kellen, which is the deconsolidated adversary proceeding in Adv. No. 2:15-ap-01680. The operative pleadings for the Plan Agent's claims against Kellen are his 4th amended complaint in Adv. No. 2:15-ap-01680 and

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

her answer thereto, ECF 56 and 57, filed on 4/12/18 in that adversary proceeding. The Plan Agent's claims in the 4th amended complaint in that adversary proceedings are: (1) 20th claim for relief - disallowance of amended claim - 11 U.S.C. 502(b)(1); (2) 21st claim for relief - disallowance of amended claim - 11 U.S.C. 502(d); (3) 22nd claim for relief - equitable subordination - 11 U.S.C. 510(d); and (4) 23rd claim for relief - recharacterization of unsecured claims. The deconsolidated Kellen adversary proceeding has a relationship to this adversary proceeding in that the discovery in that adversary overlaps and tracks the discovery in this adversary proceeding as the parties stated in their last status report filed on 3/18/19. These claims and her motion for allowance of administrative expense claims) are equitable in name and core proceeding, and need not be tied to the trial of the claims to be tried in this adversary proceeding. The court has now issued an order setting a status conference to discuss setting a pretrial conference and a trial in the deconsolidated adversary proceeding, Adv. No. 2:15-01680, for 6/21/22 at 1:30 p.m. It is possible that Kellen may request that all of the claims involving her in this adversary proceeding, the separate deconsolidated adversary proceeding and her motion for allowance of administrative expense claim be consolidated for trial pursuant to Federal Rule of Bankruptcy Procedure 7042 and Federal Rule of Civil Procedure 42, but the request would have to be made and the court would have to hear from the parties about that.

Regarding the Plan Agent's claims against Douglas Chrismas and Douglas Chrismas's counterclaims against the Plan Agent, the Plan Agent does not address many of the claims against Chrismas as the sole defendant or counterclaimant in his trial sequencing brief. Chrismas did not file a brief on trial sequencing. The Plan Agent's 12th, 13th, 14th and 15th claims for relief against Chrismas for disallowance of claims, equitable subordination of claim and recharacterization of claim are equitable claims and core proceedings and should be tried in the bankruptcy court. The Plan Agent's 16th, 18th and 25th claims against Chrismas for relief under California common law for fraud, breach of duty to creditors/dissipation of corporate assets and fraud in the inducement are legal claims subject to the holding of *Stern v. Marshall* as these claims do not stem from the bankruptcy itself and would not necessarily be resolved in the claim allowance process. These claims for which there is a jury trial right, which has been invoked. with no express consent for the

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

bankruptcy court to conduct the jury trial, should be tried by jury in the district court. With respect to Chrismas's counterclaims in his first amended counter-complaint against the Plan Agent for conversion, replevin, declaratory and injunctive relief, which remain as to his claimed art assets other than the Art Posters, which has been resolved by a separate trial, though subject to de novo review by the district court, these counterclaims must be also resolved at trial. These counterclaims are *Stern* claims as they do not stem from the bankruptcy itself or would not necessarily be resolved in the claims allowance process, but neither party timely invoked a jury trial right as to these claims pursuant to Federal Rule of Bankruptcy Procedure 9015, which make Federal Rules of Civil Procedure 38 and 39 applicable, and thus, the claims may be tried by the bankruptcy court which is to issue proposed findings of fact and conclusions of law to the district court for *de novo* review pursuant to Federal Rule of Civil Procedure 9033 since Chrismas has not given consent to the bankruptcy court entering a final judgment on these claims.

The Plan Agent's legal claims against Chrismas do not appear to be related to his equitable claims against Chrismas or Chrismas's counterclaims against the Plan Agent as these claims do not involve the same subject matter involving different facts and evidence, and thus, the legal claims should be tried by jury in the district court, and the Plan Agent's equitable claims and Chrismas's counterclaims may be tried separately before the bankruptcy court, that is, the bankruptcy court may try and enter a final judgment on the equitable claims and may try and issue proposed findings of fact and conclusions of law on Chrismas's counterclaims for *de novo* review by the district court.

The court further notes that none of the parties to the third amended cross-complaint of 400 S. La Brea, LLC, brought against the Plan Agent and Douglas Chrismas and his controlled entities addressed the claims in that pleading, which are also pending in this adversary proceeding in ECF 253 filed on 11/20/17. 400 S. La Brea's claims in its 3rd amended cross-complaint are: (1) 1st claim for relief - breach of contract; (2) 2nd claim for relief - declaratory relief; (3) 3rd claim for relief - fraudulent misrepresentation); (4) 4th claim for relief - negligent misrepresentation; (5) unjust enrichment; (6) breach of implied covenant of good faith and fair dealing; (7) trespass; (8) recoupment; and (9) intentional interference with

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

contractual relations.

Due to the grant of the Plan Agent's motion to dismiss, the only surviving claim against him in 400 S. La Brea's third amended cross-complaint is the fifth claim for relief for unjust enrichment, and as between the Plan Agent and 400 S. La Brea, the court is unsure on how this claim should be tried. While the basis for alleging this claim is California common law, the case law states that there is no cause of action in California for unjust enrichment. *Levine v. Blue Shield of California,* 189 Cal.App.4th 1117, 1138 (2010). Since the parties involved have not addressed this probably not legally cognizable claim in their briefing, the court will take no position at this time on how this claim should be tried.

All of the claims in 400 S. La Brea's third amended cross-complaint are pending against Douglas Chrismas and his controlled entities based on their answer. These claims appear to arise under California common law and do not stem from the bankruptcy itself and would not necessarily be resolved in the claims allowance process, and are thus subject to the holding of *Stern v. Marshall* that the bankruptcy court may not enter a final judgment on such claims. Most, if not all, of these claims are legal in nature for which there is a jury trial right, which Chrismas and his controlled entities have timely invoked their jury trial right in their answer to 400 S. La Brea's second amended cross-complaint, ECF 235 filed on 11/3/17. The bankruptcy court may not conduct a jury trial of these claims absent the consent of the parties, which is not given here. These claims should be tried by jury in the district court.

As to all defendants in this adversary proceeding (with possible exception of Kellen), regarding the remaining claims to be tried in the district court, the bankruptcy court will pretry the claims before referral to the district court for trial, which is not disputed by the parties in their briefing. *In re Healthcentral.com,* 504 F.3d 775, 786-788 (9th Cir. 2007). At the hearing on 5/25/22, the parties should state their positions on when they can file a joint pretrial statement and when the court should schedule the pretrial conference on the claims for trial in the district court. Cathay Bank has stated in its brief that it intends to file a motion for summary judgment and requested that the court wait until it issues its report and recommendation on this motion before referring the claims to be tried in the district court over to that court. Cathay

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

Bank did not state when it was filing its summary judgment motion and whether the filing and consideration of the motion had an impact on scheduling the pretrial conference.

As to the Plan Agent's equitable claims against Douglas Chrismas and Chrismas's counterclaims against the Plan Agent, which may be tried separately before the bankruptcy court, at the hearing on 5/25/22, these parties should state their positions on when they can file a joint pretrial statement and when the court should schedule the pretrial conference on the claims for trial in this court. It would appear that there would be two tribunals to try all of the claims in the adversary proceeding, the court believes that it would be best to issue two separate pretrial orders, one for the trial in the district court, and at least one in the bankruptcy court, through there may be an additional pretrial order for a separate trial of the claims as to Kellen.

Appearances are required on 5/25/22. The court is pleased to inform the bar and the public that Courtroom 1675 should be ready for hybrid hearings on 5/25/22, and if the testing of the new audiovisual equipment in the courtroom goes well on 5/24/22, counsel and self-represented parties may appear in person, or at their choosing, appear through Zoom for Government in accordance with the court's remote appearance instructions.

Party Information

Debtor(s):

Art and Architecture Books of the	Represented By Thomas M Geher Ron Bender Beth Ann R Young Krikor J Meshefejian Kurt Ramlo David W. Meadows

Defendant(s):

Ace Gallery New York Corporation,	Pro Se

Plaintiff(s):

THE OFFICIAL COMMITTEE OF	Represented By

United States Bankruptcy Court
Central District of California
Los Angeles
Robert Kwan, Presiding
Courtroom 1675 Calendar

Wednesday, August 16, 2023 **Hearing Room 1675**

1:30 PM

CONT... Art and Architecture Books of the 21st Century **Chapter 11**

Victor A Sahn

U.S. Trustee(s):

United States Trustee (LA) Pro Se